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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 761

CHASE BRASS AND COPPER CO., Incorporated,
Appellant,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal from the Court of Appeal of California,
First Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF OF THE FINANCIAL EXECUTIVES INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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PARKS OF ROBERT B. ANDREW PRINTING, INC., WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Financial Executives Institute hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellee was requested but refused.

The Financial Executives Institute is an individual membership, professional organization composed of approximately 7,000 corporate executives who are responsible for the development of financial policy and the administration of financial affairs of both large and small companies in the United States, Canada and Puerto Rico. The companies with whom FEI's members are associated represent a broad cross-section of American business and industry and they conduct a significant portion of the nation's interstate commerce.

One of the primary objectives of FEI is to provide a means for its members to make joint studies and recommendations on matters of broad financial significance, including developments in state and local taxation which significantly affect business or the environment in which it operates.

The specific interest of FEI in this case is that the decision of which review is now sought constitutes a serious inroad upon the well-established rules that a state may not tax out-of-state corporations upon income not in any way attributable to activities within the taxing state and that common ownership alone does not justify state taxation of one corporation upon the basis of income earned by an independent but affiliated corporation.

In view of the essential role these constitutionally based principles have played in the proper growth and development of the nation's interstate commerce, the potential consequences of the present decision are of the gravest concern to FEI and to the nation as a whole.

Accordingly, FEI hereby seeks leave to file the attached brief as amicus curiae to show the Court that

the present decision threatens to eviscerate some of the most fundamental safeguards against multiple and discriminatory state taxation of interstate business and by so doing would impose an undue burden upon the continued growth of the nation's interstate and foreign commerce.

We, therefore, urge that leave be granted to file the attached brief as amicus curiae and respectfully so move the Court.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the Court of Appeal of California, First Appellate District, is reported at 7 Cal. App. 3d 99, 86 Cal. Rptr. 350 (1970); and its opinion on denial of petition for rehearing is reported at 10 Cal. App. 3d 496, 87 Cal. Rptr. 239 (1970).

INTEREST OF AMICUS CURIAE

The interest of Financial Executives Institute, Inc., (FEI) in this case is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

Objectively considered, the tax, imposed by the State of California upon Chase Brass and Copper Co. (Chase) in this case, is for all practical purposes a tax upon extra-territorial income of an out-of-state corporation, Kennecott Copper Corporation (Kennecott). Although such taxes have uniformly been held unconstitutional by a long line of decisions by this Court,[1] it was nevertheless sustained by the California Court in this case on the ground that it was a tax, not upon the out-of-state corporation, but upon an independently operated affiliate corporation which does business within California. In this respect the decision in this case is unprecedented.

The harmful effects of the present decision, if allowed to stand, are several and substantial. First, the decision and the tax it upholds are blatantly discriminatory against multi-corporate enterprises.

The real basis for the sevenfold increase in Chase's tax liability in this case is the common ownership between it and Kennecott. It is a tax based, not on the relevant facts of the taxpayer's earnings and operations, but on the completely irrelevant consideration of the taxpayer's affiliation by common ownership with a more profitable out-of-state corporation. By arbi-

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[1] See, e.g., *Norfolk & Western Ry.* v. *Missouri Tax Comm.*, 390 U.S. 317; *Hans Rees Sons'* v. *North Carolina*, 283 U.S. 123; *Wallace* v. *Hines* 253 U.S. 66.

trarily imposing upon corporations with out-of-state affiliations a substantial tax burden not imposed upon corporations without such affiliations, California is indirectly, but nevertheless plainly, discriminating against multi-corporate enterprises and against the interstate commerce of which those enterprises are a significant part. Moreover, it is an added tax burden for which there is no commensurate increase in services or other benefits from the state which could even purport to justify such discriminatory treatment.

The major vice of the decision in this case, however, is that it sustains a wholly extra-territorial tax on out-of-state income earned by an out-of-state corporation. If this decision is allowed to stand, it means that henceforth with respect to the great majority of multi-corporate enterprises the states are no longer subject to the constitutional limitation that they may tax only activities and values within their borders. The most fundamental safeguard against multiple taxation of interstate business will thus be removed.[2] A fair and equitable system of distribution for tax purposes of income among the fifty states is rendered virtually impossible by a decision such as the present one.

Moreover, the reach of the present decision is not limited to the taxation of income attributable to activities in other states. Extended to its logical conclusion, the decision would allow California to tax corporations operating within its boundaries upon the basis of income earned outside of the United States by

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[2] The danger of multiple taxation is clearly illustrated by this case where California included in Chase's tax base approximately $5,000,000 of out-of-state net income earned by Kennecott Wire notwithstanding that Kennecott Wire had paid the State of Rhode Island tax on its entire net income.

their foreign affiliates. Indeed, California has already applied its combined reporting requirement to Canadian affiliates of companies operating within California. Carried to its logical end, therefore, California's application of the unitary business concept will interject the states improperly into the delicate area of international trade and relations, contrary to the explicit recommendation of the Report of Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the United States House of Representatives, which states:

> "In keeping with the basic structure of our Federal System, the Committee is of the view that international tax policy should be formulated by the Federal Government and not by individual states.
> * * * * * * * * * *
> Likewise, no State would be allowed to require that such income [from sources outside the United States] be included in the consolidated income of a multicorporate enterprise for apportionment purposes."
>
> H. Rep. No. 952, Vol. 4, p. 1155, 89th Cong., 1st Sess. (1965).

Although the case does not directly involve the taxation of income earned outside of the United States, the foregoing consideration illustrates the grave danger of allowing the states to tax extra-territorial activities simply because multi-corporate enterprise is involved. The traditional territorial and jurisdictional restrictions upon state taxing power which this Court has developed under the Constitution's Commerce Clause have played an essential part in the full development of the nation's business among and between fifty states with varying and often conflicting tax systems. The

present system seeks to erode those restrictions. If it is successful, the result will be a step toward a balkanization of the country's commercial activity which the Commerce Clause was designed to prevent.

CONCLUSION

For the foregoing reasons it is submitted that the decision in this case raises substantial and serious questions under the Commerce and Due Process Clauses of the Constitution and presents issues of great importance to the nation's commercial structure. Accordingly, FEI respectfully supports appellant's request that the Court note probable jurisdiction and grant a plenary hearing on the merits.

Respectfully submitted,

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